Supreme Court of the United States.

No. 47.—October Term, 1900.

William L. Powers, Hattie Dean, Edward Deane, F. S. Bell, Ivan Chase, John K. McCornack, Ann J. Clyde, J. R. Malhern, Spokane & Palouse Railway Company, a corporation; Spokane & Palouse Land Company, a corporation; Palouse Mill Company, a corporation, and A. F. Pugh, Plaintiffs in Error,
vs.
Jacob Slaght.

In error to the Supreme Court of the State of Washington.

[January 7th 1901.]

This action was commenced in one of the courts of the State of Washington by the present plaintiffs in error. They alleged in their second amended complaint that on or about December 15th 1883 the Northern Pacific Railroad Company, under and by virtue of the act of Congress approved July 2d 1864, 13 *Stat.* 365, *c.* 217, granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast, and the various acts and joint resolutions of Congress supplemental thereto and amendatory thereof, applied at the United States district land office in the district in which the lands were situated to select and selected lots 10, 11, 14 and 15 in section 1, township 16 north of range 45 east, Willamette meridian, Washington, with other lands, as indemnity in lieu of lands within the place limits of the grant to the company and which had been reserved, sold, granted or otherwise appropriated, or to which pre-emption or other claims or rights had attached at the date when the line of the company coterminous therewith was definitely fixed by filing a plat thereof in the office of the Commissioner of the General Land Office—a list of the lands selected, prepared in the manner and form prescribed by the rules and regulations of the Interior Department, being filed by the company in the district land office, and tender and payment made to the receiver thereof of the fees required by law to be paid upon the selection of lands. The list was allowed and approved by the register and receiver on December 17th 1883, the fees accepted, and thereafter the list was transmitted to the Commissioner of the General Land Office for approval. These lands were selected as public land to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights, except such reservation, appropriation, claim and rights as had attached thereto in favor of the railroad company.

On October 26th 1887 the railroad company, in compliance with other and additional instructions of the officers of the Interior Department issued and given after the above selection had, as stated, been accepted, allowed and approved, filed a list designating the losses in lieu of which the lands described in the selection list were selected; and thereafter, in the years 1892 and 1893, the company, in compliance with instructions issued by the officers of the Interior Department subsequently to the acceptance, allowance and approval of the selection, rearranged the list of losses and the selection list so that the losses for which each tract of land selected by the company had been taken should be specifically designated. It appeared from the rearranged list that the lands in question were selected in lieu of certain lands included in section 7, township 9 north of range 15 east, Williamette meridian, Washington, which last-described land was located coterminous with and within forty miles of the line of the company as definitely fixed, and was at the date of the grant to the company, and at the date when its line coterminous therewith was definitely fixed, included in a reservation of land set apart for the Yakima Indians.

On or about December 24th 1885, after the selection of the above-described land, the Northern Pacific Railroad Company entered into a contract in writing with the plaintiff William L. Powers to convey to him lots 3, 6, 11 and 14 in section 1, township 16 north of range 45 east, upon the payment by him to the company of the sum of $822; and on August 4th 1887, payment having been made, the company conveyed the lots to him.

On July 30th 1887 the company conveyed to Powers lots 2, 7, 10 and 15 in that section.

In the year 1877 A. M. Duffield settled upon lots 2, 3, 6, 7, 10, 11, 14 and 15 in the section in question. Shortly thereafter he sold and assigned his possessory rights and improvements to L. M. Rhodes, and thereafter, Rhodes having failed to make payment therefor, the property was assigned to the plaintiff Powers, who settled thereon in 1881 with the expectation and intention of purchasing the lands or a portion thereof from the railroad company. Soon after such settlement Powers offered to purchase lots 2, 7, 10 and 15 from the company, and at the same time John G. Powers, a brother of the plaintiff, offered to purchase lots 3, 6, 11 and 14 from the company. Thereafter, as above stated, the plaintiff William L. Powers purchased the lands from the railroad company, having prior thereto taken a relinquishment from his brother of all interest in and to lots 2, 7, 10 and 15.

On or about March 1st 1883 the defendant Slaght rented and leased lot 10 of the plaintiff Powers, and received and took possession of the same. He paid rental therefor, as agreed, from the date upon which he took possession of the premises until the 31st day of October 1887.

On the last-named day Slaght presented an application at the United States district land office for the district in which the land was situated, to enter lots 10, 11, 14 and 15 as public lands of the United States, under the act of Congress approved May 20th 1862, 12 *Stat.* 392, *c.* 75, entitled "An act to secure homesteads to actual settlers on the public domain," alleging in his application that he had settled and established his actual residence upon those lands March 4th 1883, that such residence had been thereafter continuous, and that he had built a house on the land and improved the same. In the complaint in this case the plaintiffs averred that the settlement, occupation and improvement by Slaght were under and in pursuance of the renting and leasing of and from Powers, as above set forth, and not otherwise.

The Northern Pacific Railroad Company having been notified of the application of Slaght to enter the land, filed its objections against the allowance thereof on or about December 2d 1887. A hearing was ordered by the United States district land officers for the district in which the land was situate to determine the rights thereto of the railroad company and Slaght, and such proceedings were had in the contest that the district land officers, in July 1889, held the land to be excepted from the operation of the selection of the railroad company by reason of the settlement of the plaintiff Powers, and that the defendant Slaght had settled upon the land as the tenant of Powers.

The railroad company appealed from the decision of the district land officers to the Commissioner of the General Land Office. On April 13th 1895 the Commissioner rendered the following decision, directed to the register and receiver of the district land office at Walla Walla: "I have considered the contest of *Jacob Slaght* v. *Northern Pacific Railroad Company and William L. Powers, Intervenor,* involving lots 10, 11, 14, 15, sec. 1, T. 16 N., R. 45 east, the record in which was transmitted with your letter of July 10th 1889, on appeal by Jacob Slaght and said railroad company from your decision in favor of William L. Powers, intervenor. The land is within the limits of the withdrawal upon the line of the amended general route of said road, the map showing which was filed February 21st 1872, and upon the definite location of the road it fell within the indemnity limits, the order for the withdrawal of which was received at the local office November 30th 1880. These withdrawals have been held by the Department to be without authority of law and of no effect. 17 *L. D.* 8, *and* 18 *L. D.* 87. On December 17th 1883 the company selected the land in question under act of July 2d 1864 (13 *Stat.* 365), per list No. 1, and on the same day said company selected the land under acts of July 2d 1864 (13 *Stat.* 365) and May 31st 1870 (16 *Stat.* 376) for indemnity purposes per amendatory list No. 2. On October 31st 1887 Jacob Slaght presented an application to make homestead entry for this land and alleged that he

settled and established his actual residence thereon March 4th 1883 and the same has been continuous; that he built a house 12 x 14 feet, a kitchen 10 x 12 feet, a stable, dug a cellar and broke a garden spot, and built a half mile of fence, and that his improvements are worth about $275. The company was duly notified of said application and filed its objections against the acceptance of the same December 2d 1887. Upon the issuance of notice to the parties in interest a hearing in the case was had and concluded April 4th 1889, at which all parties were represented. The testimony adduced at the hearing on behalf of Slaght shows that he established his actual residence on the land in March 1883; that he broke and planted a garden; that within a few days after moving in the log house on the land he built an addition thereto; that in September 1883 he built a house 12 x 14 feet, a kitchen, a stable, a chicken house, dug a cellar, and fenced about eighty acres; that his residence on the above-described tracts of land has been continuous since March 1st 1883, and that his improvements are worth $400, and that he is a qualified settler."

After stating the substance of the evidence adduced, the Commissioner proceeded: "Therefore, in view of this showing, your decision in favor of William L. Powers is hereby reversed, likewise your decision adverse to Jacob Slaght. Your opinion that said company's selection as to this land was improperly allowed, and that the company had no right to the land prior to its selection, and as the same was occupied and improved as the home of a settler, Slaght's, at the date of selection, that such selection as to the land in question should be cancelled, was in accordance with the uniform practice of the Department, and I concur therein. Accordingly, said amendatory list No. 2 of selections of Dec. 17th 1883 by said company is hereby held for cancellation as to said lots 10, 11, 14, and 15, sec. 1, twp. 16 N., R. 45 E. The usual time, sixty days after notice, will be allowed the railroad company and William L. Powers within which to appeal to the honorable Secretary of the Interior. Should this decision become final, Slaght will be permitted to make homestead entry for this land. You will advise him of this action."

From the decision of the Commissioner the Northern Pacific Railroad Company appealed to the Secretary of the Interior, who, in 1896, affirmed the action of the Commissioner.

In 1897 Slaght received from the Interior Department letters patent of the United States conveying to him lots 10, 11, 14 and 15.

The plaintiffs averred that the letters patent were issued to Slaght under a misconstruction and misinterpretation of the law; that long prior to the settlement upon the land by Slaght the lands and each and all of them had been reserved for the use and benefit of the railroad company; that the plaintiff Powers had settled upon the lands with the intention of purchasing them from the company; that the lands were subject to selection

by the company, and by its selection thereof it acquired the title in and to the same; that at the time Slaght applied to enter the land, and at the date of the hearings in the contest above referred to, and at the date of the issuing of the letters patent to him, the land was not, nor was it at any of those times, public land subject to settlement or entry under the land laws of the United States other than the act of Congress approved July 2d 1864, above referred to, granting lands to the railroad company; and that the officers of the Interior Department were without authority to issue letters patent purporting to convey the land to Slaght, because the United States had long prior to the issuing of those letters parted with the title to the railroad company.

The complaint stated that the other of the above named plaintiffs in this cause asserted and claimed title to certain portions of the lands in dispute under and by virtue of conveyances from Powers and his grantees.

It was also averred that the plaintiff Powers had conveyed to various parties, with warranty to defend the title thereof, certain other portions of the land; that the questions involved and to be determined in this action were of common and general interest to many persons, who were so numerous that it was impracticable to bring them into court; that the plaintiffs and such other persons were the owners in fee-simple and had an indefeasible title and were in possession of the lots named, and the defendant claimed an interest or estate therein adverse to the plaintiffs, but that defendant had no estate, right, title or interest whatever in the same or to any part thereof; that the defendant was threatening to commence divers suits in ejectment, and without suit forcibly to dispossess and eject plaintiffs and the other numerous parties of and from the premises or a portion thereof, and unless restrained by an order of court would bring such suits, and would also without suit forcibly enter the premises and without any right whatever eject and dispossess them; and that thereby a multiplicity of suits would be caused and great costs and injuries inflicted upon them, the courts of the State greatly and unnecessarily burdened, and great and irreparable injury wrought to the other parties having common and general interest in the question involved in the cause.

The plaintiff therefore prayed (among other things) that the letters patent issued to Slaght be declared to have been issued under a misconstruction of the law and to be void and to constitute clouds upon the titles of the plaintiffs and of the various persons to whom the plaintiff Powers had conveyed any portion of the land in dispute; that Slaght be decreed to be a trustee holding such right, title and interest in and to those lands as he acquired under and by virtue of such letters patent, if any, for the benefit of the plaintiff Powers and his grantees, both direct and through mesne conveyances, and that Slaght be required to convey such right, title and interest, if any, to the plaintiff Powers and his grantees.

The plaintiffs also prayed for such other and further relief as was equitable and just.

A demurrer to the amended complaint was sustained and the plaintiffs electing not to plead further, the action was dismissed.

The judgment of dismissal was affirmed by the Supreme Court of the State of Washington upon the authority of the decision of that court in *Moore* v. *Carmode*, 20 *Wash.* 305, 712, just decided upon appeal to this court.

Mr. Justice HARLAN, after stating the facts as above reported, delivered the opinion of the Court.

The issue as to the validity of the order of withdrawal made by direction of the Secretary of the Interior of lands within the indemnity limits of the Northern Pacific Railroad Company, as indicated by the company's accepted map of definite location, presents the controlling question in this case. Unless such order be sustained as a valid exercise of power by that officer, there is no ground upon which a decree could be rendered against Slaght.

For the reasons stated in *Hewitt* v. *Schultz*, just decided, we hold, in conformity with the long-established practice in the Land Department, that that order of withdrawal must be regarded as inconsistent with the true construction of the act of Congress of July 2d 1864. The judgment of the Supreme Court of Washington is, accordingly,

Affirmed.

Mr. Justice BREWER and Mr. Justice SHIRAS dissented.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 48.—October Term, 1900.

J. M. Moore, Plaintiff in Error,
vs.
D. B. Stone, Ammvillis Allen, Alma May Stone et al.

In error to the Supreme Court of the State of Washington.

[January 7th 1901.]

On the 12th day of December 1883 the Northern Pacific Railroad Company selected the northeast quarter of section 3, in township 13 north of range 42 east, Willamette meridian, in Garfield County, Washington, under the direction of the Secretary of the Interior, as indemnity in lieu of other lands. In making the selection it filed in the district land office at Walla Walla a list showing the tract selected, at the same time tendering to the officers of the district land office the fees required by law. The tract was selected as public land, to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claim or rights. The list was accepted, allowed and approved by the officers named on January 5th 1884, and transmitted to the Commissioner of the General Land Office. On October 26th 1887, in compliance with and in pursuance of certain orders and directions subsequently made by the Secretary of the Interior, the railroad company designated the losses for which the above-described lands were selected as indemnity.

On the 30th day of June 1884 the defendant Dimon B. Stone presented an application to make a pre-emption declaratory statement for the lands selected as above stated by the railroad company, to the district land office at Walla Walla, alleging settlement upon the land April 25th 1882. His application was rejected, and on appeal to the Commissioner of the General Land Office a hearing in the matter was ordered to determine the condition of the land at the date of its selection and the respective rights of the defendant and the railroad company. At the hearing the officers of the district land office, in January 1891, held that the settlement of the defendant and the application to file the pre-emption declaratory statement excepted the lands from the grant to the railroad company, and that therefore they were not subject to selection by it; and the selection made was recommended to be cancelled.

The railroad company appealed to the Commissioner of the General Land Office. In a decision rendered April 30th 1895, and directed to

the register and receiver at Walla Walla, that officer said: "The land is within the limits of withdrawal upon the line of amended general route of said road, the map showing which was filed Feb. 21st 1872, and upon the definite location of the road it fell within the indemnity limits, the order for withdrawal of which was received at the local office Nov. 30th 1880. These withdrawals have been held by the Department to be without authority of law and of no effect. 17 *L. D.* 8, *and* 19 *L. D.* 87. . . . The testimony adduced at the hearing shows that Stone is a qualified settler, and established his actual residence with his family on the land about the middle of April 1882, in a cabin he built upon the tract; that in the summer of 1882 he built a house 16 x 24 feet, one and a half stories high, dug a well, and cultivated a garden; that in 1883 he cropped 15 acres to grain, in 1884 and 1885 15 acres, and in 1886 and 1887 40 acres, in 1888 45 acres, in 1889 140 acres, and in 1890 155 acres; that he has fenced the whole place, and that his improvements are worth from $700 to $800. You are of the opinion that Co.'s selection as to this land was improperly allowed, and that the Co. had no right to the tract prior to its selection, and that as the land was occupied and improved as the home of a qualified settler at the date of such selection, that such selection as to the land in question should be cancelled and Stone's application to make pre-emption should be overruled; your ruling is in accordance with the uniform practice of the Department, and I concur in same. Therefore, your decision is sustained and the amendatory list No. 1 of selection of Jan. 5th 1884, by said Co. is hereby held for cancellation as to the above-described tract of land."

On July 2d 1895 the railroad company, by general warranty deed and for a valuable consideration, sold and conveyed the north half of section 3 in the above-named township to the plaintiff Moore.

On May 20th 1896 the Secretary of the Interior sustained the above decision of the Commissioner of the General Land Office.

The amended complaint of the plaintiff Moore, after setting out the foregoing facts, alleged that the above decisions by the officers of the Land Department and the Secretary of the Interior were made and rendered under a misapprehension and mistake of law and were contrary to law; that under the rules and practice of the Department of the Interior the decision of the Secretary finally closed and determined in that Department the controversy as to the tract of land, of which fact the parties received notice, the contest being closed July 10th 1896; that thereafter the defendant made final proof and received a final receipt for the land, in which it was recited that he was entitled to a patent for the land from the United States; and that in 1897 a patent was issued to him.

The plaintiff averred that the United States district land officers, the Commissioner of the General Land Office and the Secretary of the Inte-

rior were wholly without jurisdiction to consider the application of the defendant Stone to make pre-emption entry of the land, for the reason that it was not public land of the United States subject to homestead entry, but at the time of the defendant's application had been withdrawn by order of the Secretary of the Interior from entry or sale under the settlement laws of the United States; that the railroad company was the owner in fee-simple of the premises and entitled to the legal title thereto and to a patent from the United States; that the patent issued to the defendant, or which, if not issued, would be issued to him, constituted the defendant a trustee, holding the legal title for the benefit of the plaintiff, and cast a cloud upon his title.

It was set out in the complaint that in 1898 the wife of the defendant Stone died intestate, "leaving as her heirs the defendants herein, who, excepting defendant D. B. Stone, are her children and the only children surviving her and the only children which she has or ever had; that the premises and property herein described, if any right or interest was ever acquired by defendant D. B. Stone, was acquired after his marriage with the said deceased; that some of said children of said deceased are of age and some are minors; that the names of those who are minors are Sylvia S. Jenks, Orson Emer Stone, Harland Clifford Stone, and Orlie Otis Stone; that the said Ammvillis Allen and Sylvia S. Jenks are married; that said children and defendants other than D. B. Stone have no other rights except as heirs of the said deceased."

The plaintiff therefore prayed that the defendants be declared trustees for the use and benefit of plaintiff; that by decree it be adjudged that defendants or either of them have no right, title, interest or estate whatever in and to these lands and premises or any part thereof; that the title of plaintiff be decreed good, valid and a fee-simple title; and that defendants be required to execute and deliver to plaintiff deed or deeds so as to vest in plaintiff a complete record title in and to the premises; that any and all pretended claims of defendants or either of them be held for naught and cancelled; that the defendants and each of them be enjoined and debarred from asserting any claim whatever in or to the lands or any part thereof adverse to the plaintiff; that plaintiff have judgment quieting his title against defendants and each of them, and removing the cloud thereon created by the pretended claim or claims of defendants or either of them; that plaintiff be adjudged entitled to immediate and exclusive possession of the premises and the whole and every part thereof and be put into possession thereof by order of the court; and that plaintiff have such other or further relief as should seem meet, proper and agreeable to equity.

The amended complaint was demurred to, and the demurrer was sustained; and the plaintiff declining to plead further, the action was

dismissed. The judgment of dismissal was affirmed in the Supreme Court of the State, on the authority of *Moore* v. *Cormode*, 20 *Wash.* 305, 713.

Mr. Justice HARLAN, after stating the facts as above reported, delivered the opinion of the Court.

As in the other cases just decided, the plaintiff's right to recover depended upon the validity of the order made by the Secretary of the Interior directing the withdrawal from sale or entry under the pre-emption and homestead laws of the United States of the odd-numbered sections of land within the indemnity limits of the Northern Pacific Railroad Company as defined by its map of definite location. The order was based wholly upon the filing and acceptance of that map, and in advance of any selection based on ascertained losses of distinct tracts in the place limits.

For the reasons stated in *Hewitt* v. *Schultz*, such order must be regarded as not authorized by the act of July 2d 1864, under which the railroad company and its grantee claimed title; and upon that ground the judgment of the Supreme Court of the State of Washington must be and is

Affirmed.

Mr. Justice BREWER and Mr. Justice SHIRAS dissented.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 49.—October Term, 1900.

J. M. Moore, Plaintiff in Error, vs. John Cormode. } In error to the Supreme Court of the State of Washington.

[January 7th 1901.]

This action was commenced in the Superior Court of the State of Washington for Garfield County. From an amended complaint filed by Moore, now plaintiff in error, it appears that on December 12th 1883 the Northern Pacific Railroad Company, under authority of the act of Congress of July 2d 1864, 13 *Stat.* 365, *c.* 217, granting lands to aid in the construction of its road, selected under the direction of the Secretary of the Interior, the northwest quarter of section 3, in township 13 north of range 42 east, Willamette meridian, in Garfield County in the then Territory of Washington, as indemnity and in lieu of other specified lands excepted from its grant.

On July 2d 1895 the railroad company for a valuable consideration sold and conveyed to Moore by general warranty deed the north half of the above-described quarter section.

Prior to that transfer, namely, on the 17th day of July 1890, the defendant Cormode presented for filing in the district land office at Walla Walla, Washington, a declaratory statement setting forth that the land in question had been settled on in March or April 1882 by Mrs. Ora Standiford, and that she and a subsequent purchaser of her improvements had resided continuously thereon until 1889, when the defendant purchased the improvements and moved upon the land.

Upon a hearing ordered before the land office at Walla Walla, to determine the right of the Northern Pacific Railroad Company to the land in dispute, the register and receiver of that office, in January 1891, held that the settlement upon the premises by Mrs. Standiford and the occupation of the same thereafter by her and the subsequent purchasers, including the defendant, excepted the lands from the grant to the railroad company, and that therefore they were not subject to selection by it. The selection made by the company was accordingly recommended to be cancelled.

An appeal was taken by the railroad company to the Commissioner of the General Land Office, and that officer rendered a decision on April 25th 1895, directed to the register and receiver at Walla Walla, in which he said: "I have considered the above entitled case, involving N.W. 3,

13 N., 42 E., appeal by the R'y Co. from your decision in favor of Cormode. The land is within the indemnity limits of the grant to the Northern Pac. R. R. Co., and was selected by the Co. Jan. 5th 1884, list No. 1. Both parties appearing at the hearing held Jan. 6th 1891, and from the testimony then taken it appears in substance as follows: The land was settled on March or April, 1882, by Mrs. Ora Standiford, who was qualified to enter under the homestead law. Her settlement consisted of the erection of a frame house 16x18 ft., 1 story and a half high, on the land, the plowing and cultivating of three or four acres, and the digging of a well. At that time she established her residence on the land and remained there continuously with her family until the fall of 1885, when she sold her improvements upon and interest in the land to John A. Long, who occupied the land for a short time and was succeeded by his brother, Henry W. Long, in 1888, who remained in possession until the fall of 1889, when the present applicant, Cormode, who applied for the same under pre-emption law in July, 1890, purchased the improvements and moved onto the land. Since then Cormode continuously resided upon and improved the land. It would thus appear that on Jan. 5th 1884, when the right of the R'y Co. attached, the land was embraced in the *bona fide* settlement of a party, Mrs. Standiford, qualified to enter the same under the settlement laws. Your decision is therefore affirmed and the Co.'s selection of that date held for cancellation as invalid."

The decision of the Commissioner was sustained by the Secretary of the Interior on May 20th 1896.

Thereafter the defendant Cormode made final proof of his claim, and, a final receipt having been issued to him by the district land office, on the 2d of May 1898 he received a patent from the United States conveying to him the title to the land.

The plaintiff averred that the decisions of the register and receiver of the General Land Office and the Secretary of the Interior were made and rendered under misapprehension of law; that the officers of the Land Department and the Secretary of the Interior were wholly without jurisdiction to consider the application of the defendant to make pre-emption entry of the land, for the reason that the land was not at that time public land of the United States and was not then subject to homestead entry, but before the date of the defendant's application had been withdrawn from entry or sale, and that the decisions allowing the defendant to enter the land were void, and the entry made also void and of no effect; that the Northern Pacific Railroad Company under the grant by the act of July 2d 1864 became and was the owner in fee simple of the land and entitled to a patent therefor from the United States; that the defendant's patent constituted him a trustee, holding the legal title for the benefit of the plaintiff, and was a cloud upon the latter's title; and that the defendant wrongfully and unlawfully

withheld the possession of the premises, although the plaintiff had at various times demanded the same.

A demurrer to the complaint was sustained; and the plaintiff declined to plead further. Whereupon the court, on motion of the defendant, dismissed the action. That judgment was affirmed in the Supreme Court of the State, all the members of the court concurring in such affirmance. In its opinion in the case that court said: "But, taking a broad view of the question in considering the primary effect of the act [of Congress of July 2d 1864] as a matter of public policy, which is always permissible where there is room for construction and the true intent is a matter of doubt, we are of the opinion that there was no intention to withdraw from actual settlement the immense quantity of lands embraced within the indemnity limits. This phase of the matter has received consideration in a number of cases. Attention is called to the fact that it was expected when the law was enacted that the road would be speedily constructed, and that it would traverse, in the main, practically unoccupied territory, and that there would be consequently no great loss of lands within the place limits. It might well have been considered that there would be ample lands within the indemnity limits to make good such losses, although these lands were open to settlement at all time prior to their actual selection. See *N. P. R. R. Co.* v. *Musser, Sauntry, &c.*, 168 *U. S.* 604. And after a consideration of the numerous cases cited in the briefs we are of the opinion that the grant did not take effect as to any lands within the indemnity limits until actually selected by the company, and that prior thereto they were open to settlement. It has been the long-continued policy of the Government to facilitate the settlement of its unoccupied lands, and so great a restriction as this would have been under the company's contention could hardly have been contemplated. The departmental withdrawal was subsequently set aside and cannot operate to extend the provisions of the act. Those parts of the discussion or statements in some of the cases most relied upon by the appellant are not in harmony with the later expressions of the court, especially in *N. P. R. R. Co.* v. *Colburn*, 164 *U. S.* 383, and *N. P. R. R. Co.* v. *Sanders*, 166 *U. S.* 620. Also the prevailing and long-continued construction of the act by the Land Department is entitled to great weight in determining the questions raised. Many patents have been issued thereunder to settlers who are now occupying the lands, as in this case, and doubtless frequent transfers have been made to others who have regarded the title as perfect, for the issuance of a patent is regarded by the common mind as conclusive, and if it is a matter of doubt the overturning of these rights and the construction of the Land Department should be reserved for the highest court in the land. Furthermore it is most strenuously insisted by the respondent that the case must be decided in his favor on the ground that it does not appear that there was any finding by the Land Department that there was any defi-

ciency in place lands, and that under the familiar rule applied to judgments, if an affirmative finding that there was no loss of place limits was necessary, then that such finding would be presumed; that all presumptions are in favor of the regularity of the proceedings in the Land Department to sustain a patent. The appellant has undertaken to conclude this matter by averment in his complaint, and contends that the indemnity lands were appropriated without selection by reason of the deficiency in place limits, and that the court is bound by the allegations of the complaint in this particular. There is no allegation, however, that there was a finding by the Secretary of the Interior or in the proceedings before the Land Department that there was a deficiency in place limits, and it seems to us that to enable the company to claim this land there must have been a finding that there was a deficiency within the place limits for which the lands claimed were taken, or that it was conclusively established in the proceedings before the Department. This matter was a question of fact essentially within the jurisdiction of the Land Department, and its judgment should be sustained unless it appears that it is in conflict with the facts therein found or established. It may have been found that there was no deficiency entitling the company to select these lands. It was found that when the selection was made the land was occupied by a qualified settler, and the company therefore not entitled to take it. The contention of the appellant with reference to the allegations of the complaint in this respect are in our opinion overborne by the authorities. *Johnson* v. *Drew*, 171 *U. S.* 93; *Durango Land and Coal Co.* v. *Evans*, 80 *Fed. Rep.* 425; *Gale* v. *Best*, 78 *Cal.* 235; *New Dunderberg Min. Co.* v. *Old et al.*, 79 *Fed. Rep.* 598." 20 *Wash.* 305.

Mr. Justice HARLAN, after stating the facts as above reported, delivered the opinion of the Court.

The land in controversy is within the indemnity limits of the Northern Pacific Railroad Company as shown by its map of definite location. It was embraced by the order made by the Secretary in November 1880, whereby the local land office was directed to withdraw and hold reserved "from sale or homestead or other entry" all of the odd-numbered sections "within the place and first indemnity limits" of the Northern Pacific Railroad, as indicated on its map of definite location filed in October 1880. That order of course proceeded on the ground that under the act of July 2d 1864, 13 *Stat.* 365, *c.* 217, it was competent for the Secretary of the Interior immediately upon the filing and acceptance of the company's map of definite location to withdraw from the operation of the pre-emption and homestead laws all the odd-numbered sections within the indemnity limits of the road and coterminous with the line of such definite location. The act of 1864 has been differently interpreted in the Land Department

since the decision in 1888 of Secretary Vilas in *Northern Pacific Railroad* v. *Miller*, 7 *L. D.* 100. For the reasons stated in the opinion just delivered in *Hewitt* v. *Schultz*, we accept that decision as indicating the construction of the act of 1864 to be observed in the administration of the grant of public lands to the Northern Pacific Railroad Company. This leads to an affirmance of the judgment without reference to other questions discussed at the bar.

The judgment of the Supreme Court of the State of Washington must be and is hereby

Affirmed.

Mr. Justice BREWER and Mr. Justice SHIRAS dissented.

True copy.

Test:

Clerk Supreme Court, U. S.